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CURRENT LEGAL DEVELOPMENTS

SOME INTERNATIONAL LAW ASPECTS OF THE EAST TIMOR AFFAIR

On December 7, 1975 Indonesian forces invaded the territory of East Timor, a Portuguese colony for some four and a half centuries. Following the 1974 Portuguese revolution, East Timor, like other Portuguese non-self-governing territories had been going through a process of self determination. Portuguese authorities evacuated the territory in August 1975 during civil disorders, condoned if not fomented by the Indonesians. The Frente Revolucianaria de Timor Leste Independente (FRETILIN), a popular group which aimed at independence for the territory after a short transitional period, gained the upper hand. It declared independence on November 28, 1975, hoping this would strengthen its hand in dealing with Indonesian border incursions. A full-scale Indonesian invasion followed.

At the United Nations, the General Assembly and the Security Council both adopted resolutions[1] deploring the Indonesian actions, reaffirming the right of the Timorese to self-determination and calling for the withdrawal of Indonesian forces. The political will has never been there to put teeth into these resolutions,[2] but the United Nations continues to treat Portugal as the legal administering power of the territory and the General Assembly has expressly rejected the claim that East Timor has been legally integrated into Indonesia.[3]

More recently, on December 11, 1989 Australia and Indonesia signed (and later ratified) a document entitled "Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia".[4] This document purports to create a joint Australian/Indonesian regime for exploiting oil resources on the continental shelf between Australia and East Timor. On February 22, 1991 Portugal instituted proceedings against Australia in the International Court of Justice.[5] It argued

1. U.N. G.A. Res. 3485(XXX), 30 U.N. GAOR Supp. (No.34) 118, U.N. Doc. A/10034 (1976); S.C. Res. 384, 30 U.N. ESCOR, Resolutions and Decisions 10, U.N. Doc. S/Res./384 (1975).
2. Although the matter refuses to go away. Note the recent press coverage of the massacre by Indonesian forces on November 12, 1991, and of the efforts of a Portuguese peace ship, the 'Lusitania Expresso', to reach the territory in March 1992.
3. *See* U.N. G.A. Res. 31/53, 31 U.N. GAOR Supp. (No.39) 125, U.N. Doc. A/31/362 (1976).
4. The text is published in 29 I.L.M. 469 (1990).
5. Case concerning East Timor (Portugal *v.* Australia), I.C.J., not yet reported.

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that Australia, by dealing with Indonesia, had breached its international obligations towards the people of Timor and towards Portugal as the administering power recognized by the United Nations. Australia and Portugal had made appropriate declarations accepting the jurisdiction of the Court; Indonesia had not.

In the discussion that follows, I would like to address primarily two issues: (1) the legal characterization of the East Timor matter;[6] and (2) the implications of the rules on recognition for states faced with Indonesia's illegal presence in East Timor,[7] particularly Australia's actions in negotiating the 'Timor Gap' treaty with Indonesia. Portugal's proceedings against Australia in the International Court of Justice also address this latter issue but in a somewhat different manner from my approach and I shall also refer briefly to those proceedings.

I first became closely involved with the Timor case in the late 1970s when I was asked to discuss it in a petition to the Fourth Committee of the United Nations General Assembly (a committee which deals with decolonization matters) on behalf of the International League for Human Rights. It immediately occurred to me that there were at least three different ways to characterize what clearly seemed to be illegal actions on the part of Indonesia. One was to describe them as a breach of the principle of self-determination contained in Articles 1 and 55 of the United Nations Charter and its 1960 resolutions on the subject.[8] A second one was to analyse them as a breach of the Charter prohibitions on the use of force, notably Article 2, Paragraph 4,[9] and Chapter VII of the Charter, as interpreted in the Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States and its 1974 resolution defining 'aggression'. A third way was to characterize the actions as breaches of fundamental standards of human rights.

It seemed to me that, while the actions of the Indonesians were certainly breaches of basic human rights doctrine, drawing up a legal case in these terms -no matter how horribly the Indonesians behaved- did not capture the full scope of the event.[10] It did not go far enough. Human rights violations are, in a sense, matters of detail - here the whole

6. *See generally* R.S. Clark, *The 'Decolonization' of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 Yale Journal of World Public Order 2 (1980).

7. *See generally* R.S. Clark, *Timor Gap: The Legality of the 'Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia'*, Pace Yearbook of International Law (forthcoming, 1992).

8. Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N. G.A. Res. 1514(XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960); Principles which Should Guide Members in Determining Whether or Not to Transmit the Information Called for Under Article 73e of the Charter, U.N. G.A. Res. 1541(XV), *id.*, at 29.

9. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

10. A similar approach to my own is well addressed at several points *in* P. Escarameia, Formation of Concepts in International Law: Subsumption Under Self-Determination in the Case of East Timor (unpublished S.J.D. dissertation, Harvard Law School, 1988).

system of Indonesian presence was illegitimate: they simply had no legal or moral right to be there. Putting it another way, using the human rights argument entailed the risk of conceding the legitimacy of the Indonesian presence. It would seem as if it was all right that they were there, and that the important question was how they behaved. While it is right, then, to criticize the Indonesians for the outrageous behavior to the Timorese population - just as we criticized the actions of Iraq in Kuwait - it seems to me that it makes a lot more sense to embed those kinds of criticisms within terms of breaches of the law of war by an occupying force rather than to criticize the Indonesians for breaches of, say the Universal Declaration of Human Rights. The real focus of the case against Indonesia should, however, be on the arguments based on self-determination and on aggression.

As far as the principle of self-determination is concerned, this was a natural way to see the issue from the outset. When Portugal joined the United Nations in 1955, it had denied that it was in control of any non-self-governing territories to which it owed any international obligation under Article 73 of the United Nations Charter. In 1960, however, in its Resolution 1542,[11] the General Assembly had determined that Portugal was the administering power over a number of named non-self-governing territories, within the meaning of Article 73 of the Charter, including East Timor. Portugal did not accept the validity of the resolution until 1974. But at the very time of the Indonesian invasion of December 1975, the Fourth Committee of the General Assembly was engaged in a desultory debate on the territory, with Portugal's participation. The events of notorious December 7, 1975 led to a much more dramatic resolution from the Committee than might otherwise have been expected. And the Assembly has retained jurisdiction over the matter primarily through its subordinate body, the Special Committee with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

Indonesia has felt obliged to respond with a number of stock responses that those who block self-determination put forward on such occasions. They argue that they were asked to come by representatives of the people - a blatantly false assertion. They rely on the 'assent' to incorporation made by the so-called Peoples Assembly that took place in Dili in May of 1976.

This claim - based on the representative status and freedom of the Assembly - simply cannot stand up in the light of descriptions of the meeting by objective observers such as the representative from the New Zealand Embassy in Jakarta.[12]

They claim historical ties before the colonial period with old empires that never extended as far. They claim that the territory could not be economically viable and hence should not be entitled to independence. This latter claim is flatly denied by Paragraph 3 of the Declaration on the Granting of Independence to Colonial Countries and Peoples

11. U.N. G.A. Res. 1542(XV), 15 U.N. GAOR Supp. (No. 16) 30, U.N. Doc. A/4684 (1960).
12. Report from Jakarta to Wellington, June 1, 1976 released under the Freedom of Information Act.

which provides that: "Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence".

When the argument based on the use of force is made, Indonesia again responds with a series of text-book responses. One is a, patently false, kind of self-defence argument: Indonesia initiated the violence, not the hopelessly outnumbered Timorese.

A second argument is the, still false, argument that they were invited. A third is a variation on the humanitarian intervention theme: there was a struggle going on and it was necessary to intervene to save lives. This is false. The civil war accompanying the Portuguese withdrawal from the territory was over by the time the Indonesians arrived. Moreover, even the imperative of quelling violence would not extend to justifying annexation and continued presence for more than 15 years later. If there is a doctrine of unilateral humanitarian intervention in modern international law at all, it only permits a much more modest incursion than this one.

In short, it seems to me that the Indonesian case is a weak one indeed. But what implication does all this have for a state such as Australia in dealing with Indonesia? The treaty between Indonesia and Australia purports to be an interim solution to the difficult problem of delimiting the continental shelf between Australia and East Timor. Negotiations for a permanent solution are presumably 'continuing'. The solution provided by the treaty is quite complex, but basically it relies upon a sharing of resources by the creation of three areas, one to be jointly developed by Australia and Indonesia, one to be an area under sole Australian jurisdiction but with a percentage of tax revenues allocated to Indonesia, and the other to be an area under sole Indonesian jurisdiction but with a percentage of tax revenues allocated to Australia. In the context of these negotiations Australia asserted that it recognized the Indonesian incorporation of East Timor *de jure*. Australia has inextricably associated itself with the Indonesian assertion of authority over the offshore resources of East Timor. Needless to say, in putting this as clearly as I possibly can, I do not mean in any way to minimize the blatant illegality of Indonesia's action, but I do mean to criticize strongly the later complicity of Australia.

My contention is simply that Australia is in breach of its international obligations in dealing with Indonesia. In particular, its actions are a breach of the language in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States,[13] which provides that:

> The territory of a state shall not be the subject of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

13. U.N. G.A. Res. 2625(XXV), 25 U.N. GAOR Supp. (No.28), U.N. Doc. A/8028 (1970). *See* to the same effect Art. 5, Para. 3 of the 1974 Definition of Aggression, U.N. G.A. Res. 3314(XXIX), 29 U.N. GAOR Supp. (No. 31) 142, U.N. Doc. A/9631 (1975).

This language is rather blunt and has an obligatory ring to it. As I have explained in greater length elsewhere,[14] whatever view one may take of the legal effect of General Assembly resolutions as a general matter, this is a special case. It was a unanimously-adopted resolution, carefully drafted over a lengthy period, and approved on an important ceremonial occasion - the twenty-fifth anniversary of the United Nations. It has a long history in state practice, both unilateral and multilateral. It carries with it both practice and *opinio juris*, the two fundamental requirements of international customary law. The fundamental nature of the rule which it contains has recently been reinforced in the discussions -and action- over Kuwait and in the re-emergence of the Baltic states in the international community.

It also follows that, in my view, the Timor Gap Treaty is fundamentally null and void. Australia can get no better title to the territory than Indonesia. There are at least two lines of argument why this is so, although they ultimately amount to the same thing. I shall call them the 'nemo dat' and 'jus cogens' arguments.

Ian Brownlie notes in his leading text on public international law that the maxim "Nemo dat quod non habet" is a "familiar feature of English commercial law, and the principle which the maxim represents is undoubtedly a part of international law".[15] It probably makes no difference in law whether Australia was or was not aware of the defect in Indonesia's title, but of course Australia was fully aware of it from the outset.

The alternative argument is the "jus cogens" one. Article 53 of the 1969 Vienna Convention on the Law of Treaties provides that a treaty "is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". The exact scope of Article 53 is disputed, notably the categories of breaches of international law to which it applies. One thing though is stunning: the basic Charter/Friendly Relations Declaration rule proscribing the use of force is on every significant commentator's agreed list of what are the jus cogens norms.[16]

If Australia were to enter into an arrangement with Indonesia to jointly invade and take over the territory of East Timor, that agreement would clearly be void under the peremptory norm doctrine. I think the logic of the argument is that the same result follows if the territory is shared out after the invasion. This would probably be true even if Australia had completely clean hands at the moment of conquest (a matter disputed by some of Australia's critics).

14. *Supra*, note 7.

15. I. Brownlie, Principles of Public International Law, 125 (1990). Brownlie refers to the Island of Palmas Case (Netherlands *v.* U.S.), 2 Reports of International Arbitral Awards 829 (1928) where the Arbitrator held that Spain could transfer no more territorial rights under the 1898 Treaty of Paris than she herself had. In particular Spain could not transfer Dutch territory forming part of the Netherlands Indies (now Indonesia).

16. *See* the discussion *in* L. Hannikainen, Peremptory Norms (Jus Cogens) in International Law 164-64 and 323-356 (1988). Needless to say, one can make the same jus cogens argument for the right to self determination.

Now, the way in which Australia has tried to avoid the application of one or other of these arguments is by suggesting that its recognition of the Indonesian title absolves it. Its position is that it can make its own decisions about who it recognizes. This argument will simply not work under modern international law because the recognition itself is void!

I note, in conclusion, that Portugal's case against Australia in the International Court of Justice (so far as I can tell from the Application: in accordance with the Rules of the Court Portugal's initial Memorial has not yet been made public) is proceeding on the basis of a decidedly modest version of my argument. According to the Application, Portugal is emphasizing the self-determination aspect of the affair rather than the use of force aspect. It asserts that the dispute is about the opposability to Australia of (a) the duties of, and delegation of authority to Portugal as the administering power over the territory and (b) the right of the people of East Timor to self-determination and the related rights to territorial integrity and unity and permanent sovereignty over natural wealth and resources. Portugal maintains that, in its capacity of administering power, it is performing an international public service and, so long as the United Nations has not discharged it from its responsibility, it is invested with the corresponding duties and powers, which continue to be opposable, as do the rights of the people of East Timor, *erga omnes*, and hence to Australia. Australia, by negotiating with Indonesia the Timor Gap Treaty and continuing to negotiate the ultimate delimitation of the continental shelf, is said to have breached, at least, the obligation to respect the duties and powers of the administering power, the right of the East Timorese to self-determination, and Article 25 of the United Nations Charter.

This way of stating the issue is evidently designed to emphasize both the role of Portugal and the wrong which Australia has committed. It does not appear to be necessary to the line of argument made in the proceedings in the Hague to contend, as I have here and elsewhere,[17] that the Timor Gap treaty is void. The Portuguese Application simply emphasizes the wrong done by Australia in dealing with Indonesia. This is a version of the analysis that is peculiarly suited to the situation where only these two states are parties before the Court, the jurisdiction of which has not been accepted by Indonesia.[18]

Arguments based on international law, may be made in political forums like the General Assembly; they may be made before the Court of Public Opinion; they may be made before an international tribunal. One of the challenges of an international lawyer is to shape the argument in ways that are appropriate to the forum in question. I have tried in my professional involvement with the Timor issue -and in sharing some ideas here-

17. *Supra* note7.

18. Australia can be expected to make some procedural objections to the case based on the theory that Indonesia is a necessary party to the case and that it cannot proceed in Indonesia's absence. Indonesia is not likely to appear voluntarily since its position is indefensible on the merits. In anticipation of such an argument, the Portuguese case has apparently been shaped in such a way as to emphasize *Australia's* rather than Indonesia's obligations.

to think particularly in terms of the first two of these types of forum. Those who drafted Portugal's Application to the Court have made an interesting effort to shape the material in a manner that is appropriate for the third -judicial -forum.

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